IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

FIRST APPEAL NO.95 OF 1989

Regional Director,
Employees' State Insurance
Corporation, ESIC Building,
Lower Parel, Bombay - 400 013 ... Petitioner

V/s.

Newkem Products Corporation
Harganga Mahal, Dadar T.T.,
Bombay - 14 ... Respondent

Mr.H.V. Mehta for Appellant
Mr.V.P. Sawant for Respondent

CORAM: **SMT.NISHITA MHATRE, J.**

JUDGMENT RESERVED ON: **DECEMBER 3, 2004**
JUDGMENT PRONOUNCED ON: **FEBRUARY 23, 2005**

JUDGMENT:

. By this First Appeal, the Regional Director, Employees State Insurance Corporation challenges the judgment and order of the Employees State Insurance Court allowing the application filed by the Respondent-Newkem Products Corporation, holding that its sister concerns M/s.Newkem Insulation and M/s.Newkem Contractors cannot be clubbed together as their employees are not employees Newkem Products Corporation within the meaning of section 2(9) of the Employees State Insurance Corporation Act.

2. The Newkem Products Corporation was informed by

a letter dated 23.1.1973 from the Employees State Insurance Corporation that the employees of Newkem Contractors and Newkem Insulations were covered by the provisions of the Employees State Insurance Corporation Act (for short, hereinafter referred to as 'the Act') and that Newkem Corporation was responsible for payment of Employees State Insurance contributions in respect of the employees in those firms.

3. Newkem Corporation manufactures several insulation items such as asbestos, calcium silicate Insulations, glass fibre, etc. in their factory at Bhandup, Mumbai. The partners of this firm belong to the Sura family who set up Newkem Insulations a partnership firm some time in 1963. Newkem Contractors was another firm set up by the same family subsequently. All the three firms functioned from one office in Dadar, Mumbai. On inspection of the records of the Respondent-firm, the Employees State Insurance Inspector on 31.8.1972 found that the two sister firms Newkem Insulations and Newkem Contractors were procuring and executing the orders for Newkem Products Corporation.

4. Newkem Insulations were engaged in sale of products of the Newkem Products Corporation and Newkem Contractors installed these products in the premises of various customers. Newkem Insulations employed about 10

to 12 employees while the Newkem Contractors employed 10 employees. The rent receipts of the premises at Dadar were in the name of the Newkem Corporation. The Inspector found that there was inter se financial transactions between the three sister concerns and therefore, the demand was raised on the Newkem Corporation for payment of contribution in respect of the employees of the Newkem Insulations and Newkem Contractors. An application was filed by the Newkem Corporation before the Employees State Insurance Court contending that all the three concerns were separate and had no connection with each other and therefore, the demand on them was illegal. The written statement of the appellant was a reiteration of the contents of the demand notice. The evidence of both the appellants and the respondents was led before the Employees State Insurance Court. By judgment and order dated 23.3.1987, the Employees State Insurance Court allowed the application and held that the employees of the Newkem Insulations and Newkem Contractors were not the employees of the Newkem Products Corporation and, therefore, the Newkem Products Corporation was not liable to make any payment of Employees State Insurance dues. The present Appeal questions these findings of the Employees State Insurance Court.

5. The question raised in this Appeal is whether

after the amendment of the definition of ‘employee’, the employees of the Newkem Insulations and Newkem Contractors were required to be covered by the Act as they fall within the ambit of Section 2(9) of the Act. The Employees State Insurance Court while considering this question has found that the Inspector, during a single visit to the office premises, had concluded that the three concerns had functional integrality inter se and that, therefore, the Respondent-Corporation was liable to make payment of the ESI dues. The evidence of the appellant has been disbelieved by the ESI Court on the ground that the person examined on behalf of the appellant-Corporation had not visited the premises and that the person who had checked the cashbook, ledger, etc. maintained by the three firms was not examined before the Court.

6. The evidence before the ESI Court of V.A. Sura, who was examined on behalf of the Respondent-Corporation in my opinion, leaves no doubt that the three firms had functional integrality between them. All the three firms were functioning from the same premises at Dadar. The rent for the premises was paid only by the respondent-corporation. The telephone charges and postal charges were borne by the Respondent-Corporation although the two other firms paid a fixed amount per month to the Respondent-Corporation. Newkem Insulations

was established in 1963 or 1964 and Newkem Contractors came into existence in 1968. Newkem Insulations was selling the products of the Respondent-Corporation while the Newkem Contractors purchased material and the products of the Respondent-Corporation for sale. Newkem Insulations and Newkem Contractors were dissolved although the Newkem Products Corporation is still functioning and undertaking the work of the two other firms itself. The period for which the contributions had been demanded is from January 1968 to December, 1974. The demands made in respect of Newkem Contractors and Newkem Insulations are Rs.36772.55 and Rs.17808/- respectively.

7. Section 2(9) of the Act reads as under:

> 2(9) "employee" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and -
>
> > (i) who is directly employed by the principal employer, on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere; or
> >
> > (ii) who is employed by or through an immediate employer, on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or

(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service;

and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment or any person engaged as apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961), or under the standing orders of the establishment, but does not include-

(a) any member of the Indian naval, military or air forces; or

(b) any person so employed whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central Government at any time after (and not before) the beginning of the contribution period, shall continue to be an employee until the end of that period;

8. The question, therefore, arises as to whether the employees of Newkem Insulations and Newkem Contractors could be considered as persons employed for wages in connection with the purchase of raw materials for or the distribution or sale of products of factory or establishment.

9. Mr.Mehta, learned Advocate for the appellant-Corporation, submits that the work of Newkem Insulations and Newkem Contractors was connected with the work of factory of Newkem Products Corporation that

is Respondent-Corporation. He submits that when there is sufficient, cogent evidence on record to indicate that the employees of Newkem Contractors were involved in the installation of the products manufactured by Newkem Products Corporation, it could hardly be said that the employees were not connected with the work of the factory. He further urges that the evidence on record indicates that Newkem Insulations purchased material and products from the Respondent-Corporation for sale in the market and therefore, it was the employees of Newkem Insulations who were involved in the work of the factory of Newkem Products Corporation.

10. The ESI Court in my view, has not correctly appreciated the evidence on record by coming to the conclusion that the three concerns were separate and that the employees of Newkem Insulations and Newkem Contractors were not covered by the definition of employee contained in section 2(9) of the Act. The evidence of the witness for the respondent-corporation indicates that the employees of two concerns were primarily doing the work of Newkem Products Corporation. The evidence indicates that the amounts were paid by one company to the other including the amounts paid by Newkem Contractors for the purchase of the materials from the Respondent-Corporation. The expenses incurred by Newkem Contractors and Newkem Insulations for postage

and for office staff salaries were also paid by Newkem Products Corporation. Another entry found in the ledger book indicates that the travelling expenses were paid by Newkem Products Corporation to the Partner of the Newkem Insulations. Besides this, the rent for the office premises was paid by the Respondent-Corporation. Therefore, the conclusion arrived at by the ESI Court cannot be sustained.

11. Mr.Mehta correctly relies on the Judgements in *Orient Paper Mills v/s. Employees' State Insurance Corporation,* **Vol 87 FJR 605;** *Kirloskar Brothers Ltd. v/s. Employees State Insurance Corporation,* **Vol.88 FJR 602;** *Dy. Regional Director, ESIC, Thrissur v/s. Trade Links Enterprises, Ernakulam*, **2003(99) FLR 308**; *Regional Director, ESIC v/s. Ramlal Textles,* **1990 II LLJ 568;** *M/s.Ratan Silk Mills v/s. The Regional Director, ESIC* **(First Appeal No.461 of 1982);** *N.V. Radhiah & Bros. v/s. ESIC, Madras,* **Vol XXVIII FJR 439;** *Madona Textiles v/s. ESIC*, **2000 (86) FLR 690**; *Hotel Mahaveer & Ors. v/s. Regional Provident Fund Commissioner,* **2002 I LLJ 244;** *Workmen of the Straw Board Manufacturing Company Ltd. v/s. M/s.Straw Board Manufacturing Company Ltd.*, **1974 I LLJ 499;** *Isha Steel Treatment v/s. Association of Engineering Workers & Anr.,* **AIR 1987 SC 1478;** *Royal Talkies Hyderabad & Ors. v/s. ESIC through its Regional Director, Hill Fort*

Road, Hyderabad, **AIR 1987 SC 1478;**

12. On a consideration of all these judgments, I have no doubt that the three concerns were inter related and that the employees of Newkem Contractors and Newkem Insulations were connected with the business of the Respondent-Corporation. Several tests have been laid down by the Apex Court as well as different High Courts as to how the relationship between the employees of the principal employer and the contractor's employees are to be determined. One of the tests which is recognised by the Court is control of the employees of the contractor's employees by the principal employer. Another test is close business relationship between the establishments. In the present case, the evidence on record establishes the fact that there was close business relationship between the three concerns and therefore, the appellant was justified in clubbing the three establishments together and making a demand of contributions on this basis. Similarly, geographical proximity, unity of ownership, management and control, unity of employment are other tests which have been applied consistently by various Courts to determine the liability for payment of contributions. In the present case, the evidence indicates that the three firms were functioning from the same premises at Dadar. The factory of the respondent-Corporation was at Bhandup.

However, its headoffice was at Dadar. The other firms had their offices in the same premises and there was no division of these premises nor was their any apportionment between the three concerns of the rent paid for these premises. In fact the evidence on record unmistakably establishes while the Respondent-Corporation manufactured the products, the two other firms were engaged in the sale and installation of the products in other undertakings.

13. In these circumstances, the judgment of the ESI Court is set aside and appeal allowed. The application filed by the Respondent-Corporation is dismissed. No costs.